

FCC REAUTHORIZATION: IMPROVING COMMISSION TRANSPARENCY, PART II

HEARING BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS

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¹ The appendices to Mr. McDowell's testimony are available at: <http://docs.house.gov/meetings/IF/IF16/20150515/103464/HHRG-114-IF16-Wstate-McDowellR-20150515.pdf>.

FCC REAUTHORIZATION: IMPROVING COMMISSION TRANSPARENCY, PART II

FRIDAY, MAY 15, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:17 a.m., in room 2322, Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Present: Representatives Walden, Latta, Lance, Olson, Pompeo, Kinzinger, Bilirakis, Johnson, Collins, Eshoo, Welch, Loeb sack, Matsui, and Pallone (ex officio).

Staff Present: Ray Baum, Senior Policy Advisor for Communications and Technology; Leighton Brown, Press Assistant; Andy Duberstein, Deputy Press Secretary; Gene Fullano, Detailee, Telecom; Kelsey Guyselman, Counsel, Telecom; Grace Koh, Counsel, Telecom; David Redl, Counsel, Telecom, Charlotte Savercool, Legislative Clerk; Jeff Carroll, Minority Staff Director; David Goldman, Minority Chief Counsel, Communications and Technology; Lori Maarbjerg, Minority FCC Detailee; Margaret McCarthy, Minority Senior Professional Staff Member; and Ryan Skukowski, Minority Policy Analyst.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. I will call to order the Subcommittee on Communications and Technology for our legislative hearing on the “FCC Reauthorization: Improving Commission Transparency, Part II.”

And certainly welcome our expert witnesses here today. Good morning, and thank you for joining us here today to discuss a topic that I have long championed, and I am not the only one on the subcommittee that has done so, FCC process reform. I am pleased to announce that my colleague and friend, Ranking Member Eshoo, and I will reintroduce the FCC Process Reform Act.

[The discussion draft follows:]

[DISCUSSION DRAFT]114TH CONGRESS
1ST SESSION**H. R.** _____

To amend the Communications Act of 1934 to provide for greater transparency and efficiency in the procedures followed by the Federal Communications Commission, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M____ introduced the following bill; which was referred to the
Committee on _____

A BILL

To amend the Communications Act of 1934 to provide for greater transparency and efficiency in the procedures followed by the Federal Communications Commission, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Federal Communica-
5 tions Commission Process Reform Act of 2015”.

1 SEC. 2. FCC PROCESS REFORM.

2 (a) IN GENERAL.—Title I of the Communications Act
3 of 1934 (47 U.S.C. 151 et seq.) is amended by adding
4 at the end the following:

5 “SEC. 13. TRANSPARENCY AND EFFICIENCY.

6 “(a) INITIAL RULEMAKING AND INQUIRY.—

7 “(1) RULEMAKING.—Not later than 1 year
8 after the date of the enactment of the Federal Com-
9 munications Commission Process Reform Act of
10 2015, the Commission shall complete a rulemaking
11 proceeding and adopt procedural changes to its rules
12 to maximize opportunities for public participation
13 and efficient decisionmaking.

14 “(2) REQUIREMENTS FOR RULEMAKING.—The
15 rules adopted under paragraph (1) shall—

16 “(A) set minimum comment periods for
17 comment and reply comment, subject to a de-
18 termination by the Commission that good cause
19 exists for departing from such minimum com-
20 ment periods, for—

21 “(i) significant regulatory actions, as
22 defined in Executive Order No. 12866; and

23 “(ii) all other rulemaking proceedings;

24 “(B) establish policies concerning the sub-
25 mission of extensive new comments, data, or re-
26 ports towards the end of the comment period;

1 “(C) establish policies regarding treatment
2 of comments, ex parte communications, and
3 data or reports (including statistical reports
4 and reports to Congress) submitted after the
5 comment period to ensure that the public has
6 adequate notice of and opportunity to respond
7 to such submissions before the Commission re-
8 lies on such submissions in any order, decision,
9 report, or action;

10 “(D) establish procedures for publishing
11 the status of open rulemaking proceedings and
12 proposed orders, decisions, reports, or actions
13 on circulation for review by the Commissioners,
14 including which Commissioners have not cast a
15 vote on an order, decision, report, or action that
16 has been on circulation for more than 60 days;

17 “(E) establish deadlines (relative to the
18 date of filing) for—

19 “(i) in the case of a petition for a de-
20 claratory ruling under section 1.2 of title
21 47, Code of Federal Regulations, issuing a
22 public notice of such petition;

23 “(ii) in the case of a petition for rule-
24 making under section 1.401 of such title,

1 issuing a public notice of such petition;
2 and

3 “(iii) in the case of a petition for re-
4 consideration under section 1.106 or 1.429
5 of such title or an application for review
6 under section 1.115 of such title, issuing a
7 public notice of a decision on the petition
8 or application by the Commission or under
9 delegated authority (as the case may be);

10 “(F) establish guidelines (relative to the
11 date of filing) for the disposition of petitions
12 filed under section 1.2 of such title;

13 “(G) establish procedures for the inclusion
14 of the specific language of the proposed rule or
15 the proposed amendment of an existing rule in
16 a notice of proposed rulemaking; and

17 “(H) require notices of proposed rule-
18 making and orders adopting a rule or amending
19 an existing rule that—

20 “(i) create (or propose to create) a
21 program activity to contain performance
22 measures for evaluating the effectiveness of
23 the program activity; and

1 “(ii) substantially change (or propose
2 to substantially change) a program activity
3 to contain—

4 “(I) performance measures for
5 evaluating the effectiveness of the pro-
6 gram activity as changed (or proposed
7 to be changed); or

8 “(II) a finding that existing per-
9 formance measures will effectively
10 evaluate the program activity as
11 changed (or proposed to be changed).

12 “(3) INQUIRY.—Not later than 1 year after the
13 date of the enactment of the Federal Communica-
14 tions Commission Process Reform Act of 2015, the
15 Commission shall complete an inquiry to seek public
16 comment on whether and how the Commission
17 should—

18 “(A) establish procedures for allowing a bi-
19 partisan majority of Commissioners to place an
20 order, decision, report, or action on the agenda
21 of an open meeting;

22 “(B) establish procedures for informing all
23 Commissioners of a reasonable number of op-
24 tions available to the Commission for resolving

1 a petition, complaint, application, rulemaking,
2 or other proceeding;

3 “(C) establish procedures for ensuring that
4 all Commissioners have adequate time, prior to
5 being required to decide a petition, complaint,
6 application, rulemaking, or other proceeding
7 (including at a meeting held pursuant to section
8 5(d)), to review the proposed Commission deci-
9 sion document, including the specific language
10 of any proposed rule or any proposed amend-
11 ment of an existing rule;

12 “(D) establish procedures for publishing
13 the text of agenda items to be voted on at an
14 open meeting in advance of such meeting so
15 that the public has the opportunity to read the
16 text before a vote is taken;

17 “(E) establish deadlines (relative to the
18 date of filing) for disposition of applications for
19 a license under section 1.913 of title 47, Code
20 of Federal Regulations;

21 “(F) assign resources needed in order to
22 meet the deadlines described in subparagraph
23 (E), including whether the Commission’s ability
24 to meet such deadlines would be enhanced by

1 assessing a fee from applicants for such a li-
2 cense; and

3 “(G) publish each order, decision, report,
4 or action not later than 30 days after the date
5 of the adoption of such order, decision, report,
6 or action.

7 “(4) DATA FOR PERFORMANCE MEASURES.—
8 The Commission shall develop a performance meas-
9 ure or proposed performance measure required by
10 this subsection to rely, where possible, on data al-
11 ready collected by the Commission.

12 “(b) PERIODIC REVIEW.—On the date that is 5 years
13 after the completion of the rulemaking proceeding under
14 subsection (a)(1), and every 5 years thereafter, the Com-
15 mission shall initiate a new rulemaking proceeding to con-
16 tinue to consider such procedural changes to its rules as
17 may be in the public interest to maximize opportunities
18 for public participation and efficient decisionmaking.

19 “(c) NONPUBLIC COLLABORATIVE DISCUSSIONS.—

20 “(1) IN GENERAL.—Notwithstanding section
21 552b of title 5, United States Code, a bipartisan
22 majority of Commissioners may hold a meeting that
23 is closed to the public to discuss official business
24 if—

1 “(A) a vote or any other agency action is
2 not taken at such meeting;

3 “(B) each person present at such meeting
4 is a Commissioner, an employee of the Commis-
5 sion, a member of a joint board or conference
6 established under section 410, or a person on
7 the staff of such a joint board or conference or
8 of a member of such a joint board or con-
9 ference; and

10 “(C) an attorney from the Office of Gen-
11 eral Counsel of the Commission is present at
12 such meeting.

13 “(2) DISCLOSURE OF NONPUBLIC COLLABO-
14 RATIVE DISCUSSIONS.—Not later than 2 business
15 days after the conclusion of a meeting held under
16 paragraph (1), the Commission shall publish a dis-
17 closure of such meeting, including—

18 “(A) a list of the persons who attended
19 such meeting; and

20 “(B) a summary of the matters discussed
21 at such meeting, except for such matters as the
22 Commission determines may be withheld under
23 section 552b(c) of title 5, United States Code.

24 “(3) PRESERVATION OF OPEN MEETINGS RE-
25 QUIREMENTS FOR AGENCY ACTION.—Nothing in this

1 subsection shall limit the applicability of section
2 552b of title 5, United States Code, with respect to
3 a meeting of Commissioners other than that de-
4 scribed in paragraph (1).

5 “(d) ACCESS TO CERTAIN INFORMATION ON COMMIS-
6 SION’S WEBSITE.—The Commission shall provide direct
7 access from the homepage of its website to—

8 “(1) detailed information regarding—

9 “(A) the budget of the Commission for the
10 current fiscal year;

11 “(B) the appropriations for the Commis-
12 sion for such fiscal year; and

13 “(C) the total number of full-time equiva-
14 lent employees of the Commission; and

15 “(2) the performance plan most recently made
16 available by the Commission under section 1115(b)
17 of title 31, United States Code.

18 “(e) FEDERAL REGISTER PUBLICATION.—

19 “(1) IN GENERAL.—In the case of any docu-
20 ment adopted by the Commission that the Commis-
21 sion is required, under any provision of law, to pub-
22 lish in the Federal Register, the Commission shall,
23 not later than the date described in paragraph (2),
24 complete all Commission actions necessary for such
25 document to be so published.

1 “(2) DATE DESCRIBED.—The date described in
2 this paragraph is the earlier of—

3 “(A) the day that is 45 days after the date
4 of the release of the document; or

5 “(B) the day by which such actions must
6 be completed to comply with any deadline under
7 any other provision of law.

8 “(3) NO EFFECT ON DEADLINES FOR PUBLICA-
9 TION IN OTHER FORM.—In the case of a deadline
10 that does not specify that the form of publication is
11 publication in the Federal Register, the Commission
12 may comply with such deadline by publishing the
13 document in another form. Such other form of publi-
14 cation does not relieve the Commission of any Fed-
15 eral Register publication requirement applicable to
16 such document, including the requirement of para-
17 graph (1).

18 “(f) CONSUMER COMPLAINT DATABASE.—

19 “(1) IN GENERAL.—In evaluating and proc-
20 essing consumer complaints, the Commission shall
21 present information about such complaints in a pub-
22 licly available, searchable database on its website
23 that—

24 “(A) facilitates easy use by consumers; and

1 “(B) to the extent practicable, is sortable
2 and accessible by—

3 “(i) the date of the filing of the com-
4 plaint;

5 “(ii) the topic of the complaint;

6 “(iii) the party complained of; and

7 “(iv) other elements that the Commis-
8 sion considers in the public interest.

9 “(2) DUPLICATIVE COMPLAINTS.—In the case
10 of multiple complaints arising from the same alleged
11 misconduct, the Commission shall be required to in-
12 clude only information concerning one such com-
13 plaint in the database described in paragraph (1).

14 “(g) FORM OF PUBLICATION.—

15 “(1) IN GENERAL.—In complying with a re-
16 quirement of this section to publish a document, the
17 Commission shall publish such document on its
18 website, in addition to publishing such document in
19 any other form that the Commission is required to
20 use or is permitted to and chooses to use.

21 “(2) EXCEPTION.—The Commission shall by
22 rule establish procedures for redacting documents
23 required to be published by this section so that the
24 published versions of such documents do not con-
25 tain—

1 “(A) information the publication of which
2 would be detrimental to national security,
3 homeland security, law enforcement, or public
4 safety; or

5 “(B) information that is proprietary or
6 confidential.

7 “(h) TRANSPARENCY RELATING TO PERFORMANCE
8 IN MEETING FOIA REQUIREMENTS.—The Commission
9 shall take additional steps to inform the public about its
10 performance and efficiency in meeting the disclosure and
11 other requirements of section 552 of title 5, United States
12 Code (commonly referred to as the Freedom of Informa-
13 tion Act), including by doing the following:

14 “(1) Publishing on the Commission’s website
15 the Commission’s logs for tracking, responding to,
16 and managing requests submitted under such sec-
17 tion, including the Commission’s fee estimates, fee
18 categories, and fee request determinations.

19 “(2) Releasing to the public all decisions made
20 by the Commission (including decisions made by the
21 Commission’s Bureaus and Offices) granting or de-
22 nying requests filed under such section, including
23 any such decisions pertaining to the estimate and
24 application of fees assessed under such section.

1 “(3) Publishing on the Commission’s website
2 electronic copies of documents released under such
3 section.

4 “(4) Presenting information about the Commis-
5 sion’s handling of requests under such section in the
6 Commission’s annual budget estimates submitted to
7 Congress and the Commission’s annual performance
8 and financial reports. Such information shall include
9 the number of requests under such section the Com-
10 mission received in the most recent fiscal year, the
11 number of such requests granted and denied, a com-
12 parison of the Commission’s processing of such re-
13 quests over at least the previous 3 fiscal years, and
14 a comparison of the Commission’s results with the
15 most recent average for the United States Govern-
16 ment as published on www.foia.gov.

17 “(i) PROMPT RELEASE OF STATISTICAL REPORTS
18 AND REPORTS TO CONGRESS.—Not later than January
19 15th of each year, the Commission shall identify, catalog,
20 and publish an anticipated release schedule for all statis-
21 tical reports and reports to Congress that are regularly
22 or intermittently released by the Commission and will be
23 released during such year.

24 “(j) ANNUAL SCORECARD REPORTS.—

1 “(1) IN GENERAL.—For the 1-year period be-
 2 ginning on January 1st of each year, the Commis-
 3 sion shall prepare a report on the performance of
 4 the Commission in conducting its proceedings and
 5 meeting the deadlines established under subsection
 6 (a)(2)(E) and the guidelines established under sub-
 7 section (a)(2)(F).

8 “(2) CONTENTS.—Each report required by
 9 paragraph (1) shall contain detailed statistics on
 10 such performance, including, with respect to each
 11 Bureau of the Commission—

12 “(A) with respect to each type of filing
 13 specified in subsection (a)(2)(E) or (a)(2)(F)—

14 “(i) the number of filings that were
 15 pending on the last day of the period cov-
 16 ered by such report;

17 “(ii) the number of filings described
 18 in clause (i) for which each applicable
 19 deadline or guideline established under
 20 such subsection was not met and the aver-
 21 age length of time such filings have been
 22 pending; and

23 “(iii) for filings that were resolved
 24 during such period, the average time be-
 25 tween initiation and resolution and the

1 percentage for which each applicable dead-
 2 line or guideline established under such
 3 subsection was met;

4 “(B) with respect to proceedings before an
 5 administrative law judge—

6 “(i) the number of such proceedings
 7 completed during such period; and

8 “(ii) the number of such proceedings
 9 pending on the last day of such period; and

10 “(C) the number of independent studies or
 11 analyses published by the Commission during
 12 such period.

13 “(3) PUBLICATION AND SUBMISSION.—The
 14 Commission shall publish and submit to the Com-
 15 mittee on Energy and Commerce of the House of
 16 Representatives and the Committee on Commerce,
 17 Science, and Transportation of the Senate each re-
 18 port required by paragraph (1) not later than the
 19 date that is 30 days after the last day of the period
 20 covered by such report.

21 “(k) DEFINITIONS.—In this section:

22 “(1) AMENDMENT.—The term ‘amendment’ in-
 23 cludes, when used with respect to an existing rule,
 24 the deletion of such rule.

1 “(2) BIPARTISAN MAJORITY.—The term ‘bipar-
 2 tisan majority’ means, when used with respect to a
 3 group of Commissioners, that such group—

4 “(A) is a group of 3 or more Commis-
 5 sioners; and

6 “(B) includes, for each political party of
 7 which any Commissioner is a member, at least
 8 1 Commissioner who is a member of such polit-
 9 ical party, and, if any Commissioner has no po-
 10 litical party affiliation, at least one unaffiliated
 11 Commissioner.

12 “(3) PERFORMANCE MEASURE.—The term ‘per-
 13 formance measure’ means an objective and quantifi-
 14 able outcome measure or output measure (as such
 15 terms are defined in section 1115 of title 31, United
 16 States Code).

17 “(4) PROGRAM ACTIVITY.—The term ‘program
 18 activity’ has the meaning given such term in section
 19 1115 of title 31, United States Code, except that
 20 such term also includes any annual collection or dis-
 21 tribution or related series of collections or distribu-
 22 tions by the Commission of an amount that is great-
 23 er than or equal to \$100,000,000.

24 “(5) OTHER DEFINITIONS.—The terms ‘agency
 25 action’, ‘ex parte communication’, and ‘rule’ have

1 the meanings given such terms in section 551 of title
2 5, United States Code.”.

3 (b) EFFECTIVE DATES AND IMPLEMENTING
4 RULES.—

5 (1) EFFECTIVE DATES.—

6 (A) NONPUBLIC COLLABORATIVE DISCUS-
7 SIONS.—Subsection (c) of section 13 of the
8 Communications Act of 1934, as added by sub-
9 section (a), shall apply beginning on the first
10 date on which all of the procedural changes to
11 the rules of the Federal Communications Com-
12 mission required by subsection (a)(1) of such
13 section have taken effect.

14 (B) SCHEDULES AND REPORTS.—Sub-
15 sections (i) and (j) of such section 13 shall
16 apply with respect to **2014** and any year
17 thereafter.

18 (2) RULES.—Except as otherwise provided in
19 such section 13, the Federal Communications Com-
20 mission shall promulgate any rules necessary to
21 carry out such section not later than 1 year after
22 the date of the enactment of this Act.

1 **SEC. 3. CATEGORIZATION OF TCPA INQUIRIES AND COM-**
2 **PLAINTS IN QUARTERLY REPORT.**

3 In compiling its quarterly report with respect to in-
4 formal consumer inquiries and complaints, the Federal
5 Communications Commission may not categorize an in-
6 quiry or complaint with respect to section 227 of the Com-
7 munications Act of 1934 (47 U.S.C. 227) as being a
8 wireline inquiry or complaint or a wireless inquiry or com-
9 plaint unless the party whose conduct is the subject of
10 the inquiry or complaint is a wireline carrier or a wireless
11 carrier, respectively.

12 **SEC. 4. EFFECT ON OTHER LAWS.**

13 Nothing in this Act or the amendments made by this
14 Act shall relieve the Federal Communications Commission
15 from any obligations under title 5, United States Code,
16 except where otherwise expressly provided.

17 **SEC. 5. APPLICATION OF ANTIDEFICIENCY ACT TO UNI-**
18 **VERSAL SERVICE PROGRAM.**

19 Section 302 of Public Law 108–494 (118 Stat. 3998)
20 is amended by striking “December 31, 2016” each place
21 it appears and inserting [“December 31, 2020”].

Mr. WALDEN. This is a bill that passed the House in the 112th Congress and the 113th Congress had passed unanimously.

We are dedicated to improving the way that government does its business. We are introducing this bill again with the hope and expectation that the third time will indeed be the charm.

We all agree that things could be better at the FCC. The Commission regulates an incredibly dynamic and innovative sector in the American economy. It ought to serve the public in a transparent and predictable manner. This is the best way to protect consumers and to provide stability for industry and for investors.

Our bill would set procedural guardrails to protect against the potential for lapses in process. Specifically, our legislation would set goals for Commission process and would allow the FCC to determine for itself the best way to meet those goals. The objective is to grant the FCC significant latitude in setting its own deadlines in developing performance measures for program activities.

The public will be able to measure the Commission's progress by means of annual reports detailing its performance in meeting the deadlines. And provided that the Commission threatens the required rulemaking and inquiry process, the bill will also provide for non-public collaborative discussions among the Commissioners, which currently are prohibited by the Sunshine in Government Act.

I am also pleased to bring several bills offered by my colleagues across the aisle before the subcommittee for discussion. I applaud their willingness to work with the majority on improving the FCC process, and I believe there is significant merit to the draft bill as offered. We are looking forward to working together on these bills.

Representative Clarke's draft bill requires the FCC to publish a quarterly dashboard marking progress on petitions and complaints at the FCC, allowing the public to determine for themselves how efficiently the FCC is operating.

[Representative Clarke's discussion draft follows:]

[DISCUSSION DRAFT]114TH CONGRESS
1ST SESSION**H. R.** _____

To amend the Communications Act of 1934 to provide for a quarterly report on pending requests for action by the Federal Communications Commission and pending congressional investigations of the Commission.

IN THE HOUSE OF REPRESENTATIVES

M____ introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Communications Act of 1934 to provide for a quarterly report on pending requests for action by the Federal Communications Commission and pending congressional investigations of the Commission.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. REPORT ON PENDING REQUESTS FOR ACTION**
2 **BY FCC AND PENDING CONGRESSIONAL IN-**
3 **VESTIGATIONS OF FCC.**

4 (a) IN GENERAL.—Section 4 of the Communications
5 Act of 1934 (47 U.S.C. 154) is amended by adding at
6 the end the following:

7 “(p) Not later than 14 days after the end of each
8 quarter of a calendar year, the Commission shall publish
9 on the Internet website of the Commission and submit to
10 Congress a report that contains—

11 “(1) for the petitions, applications, complaints,
12 and other requests for action by the Commission
13 that were pending at the Commission on the last day
14 of such quarter—

15 “(A) the number of such requests, broken
16 down by the bureau primarily responsible for
17 action and, for each bureau, the type of request
18 (such as a petition, application, or complaint);
19 and

20 “(B) information regarding the amount of
21 time for which such requests have been pend-
22 ing, broken down as described in subparagraph
23 (A); and

24 “(2) a list of the congressional investigations of
25 the Commission that were pending on the last day

1 of such quarter and the cost of such investigations,
2 individually and in the aggregate.”.

3 (b) EFFECTIVE DATE.—The amendment made by
4 subsection (a) shall apply with respect to the quarter that
5 ends immediately after the date that is 90 days after the
6 date of the enactment of this Act.

Mr. WALDEN. Representative Loeb sack's bill would require the chairman to publish the internal procedures at the FCC which would, for the first time, allow the public to actually understand how decisions are made when the Commission goes behind closed doors to amend the proposed rules.

[Representative Loeb sack's discussion draft follows:]

[DISCUSSION DRAFT]114TH CONGRESS
1ST SESSION**H. R.** _____

To amend the Communications Act of 1934 to provide for publication on the Internet website of the Federal Communications Commission of certain policies and procedures established by the chairman of the Commission.

IN THE HOUSE OF REPRESENTATIVES

M. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Communications Act of 1934 to provide for publication on the Internet website of the Federal Communications Commission of certain policies and procedures established by the chairman of the Commission.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. INTERNET PUBLICATION OF CERTAIN FCC**
4 **POLICIES AND PROCEDURES.**

5 (a) IN GENERAL.—Section 5 of the Communications
6 Act of 1934 (47 U.S.C. 155) is amended by adding at
7 the end the following:

1 “(f) The chairman of the Commission shall—
2 “(1) publish on the Internet website of the
3 Commission any policies or procedures of the Com-
4 mission that—
5 “(A) are established by the chairman; and
6 “(B) relate to the functioning of the Com-
7 mission or the handling of the agenda of the
8 Commission; and
9 “(2) update such publication not later than 48
10 hours after the chairman makes changes to any such
11 policies or procedures.”.
12 (b) EFFECTIVE DATE.—The amendment made by
13 subsection (a) shall apply beginning on the date that is
14 30 days after the date of the enactment of this Act.

Mr. WALDEN. And Representative Matsui's bill would encourage the FCC to improve access to government for small businesses. These are all fine ideas that can gain bipartisan support and improve the state of the FCC significantly.

[Representative Matsui's discussion draft follows:]

[DISCUSSION DRAFT]114TH CONGRESS
1ST SESSION**H. R.** _____

To direct the Federal Communications Commission to submit to Congress a report on improving the participation of small businesses in the proceedings of the Commission.

IN THE HOUSE OF REPRESENTATIVES

M. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To direct the Federal Communications Commission to submit to Congress a report on improving the participation of small businesses in the proceedings of the Commission.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. REPORT ON IMPROVING SMALL BUSINESS PAR-**
4 **TICIPATION IN FCC PROCEEDINGS.**

5 Not later than 1 year after the date of the enactment
6 of this Act, the Federal Communications Commission, in
7 consultation with the Administrator of the Small Business
8 Administration, shall submit to Congress a report on—

- 1 (1) actions that the Commission will take to im-
- 2 prove the participation of small businesses in the
- 3 proceedings of the Commission; and
- 4 (2) recommendations for any legislation that
- 5 the Commission considers appropriate to improve
- 6 such participation.

Mr. WALDEN. Together with the draft bills we discussed at our last legislative hearing and the consolidated reporting bill that was passed unanimously by the House in February, these are real steps toward a higher standard for transparency of decisionmaking at the FCC. And it is high time. The industry deserves an efficient and effective regulator we can truly call expert just as the public deserves a transparent and accountable Federal Government.

I would like to thank our guests for being with us today. Mr. May and Professor Benjamin are both recognized experts in administrative law. And former Commissioner McDowell has the invaluable experience of having been part of the Commission. So your combined experience and expertise for the FCC make you invaluable advisers to us on how our proposals may impact the agency and industries governed by the FCC. So we thank you in advance for your insights, and we appreciate the testimony that you have provided.

And now I would like to ask unanimous consent to enter into the record the letter that the Chairman of the FCC, Tom Wheeler sent to both Congresswoman Eshoo and myself, memorializing his statements made before the subcommittee last month, and how he intends to address process reform with the task force. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. I applaud the chairman for his stated commitment to process reform. I do acknowledge it sounds a little familiar because we heard before our subcommittee in December of 2013 about this effort, and again, in 2011, prior Chairman Genachowski, 4 years ago this week basically said the same thing.

Unfortunately, in the intervening years, while we have seen some reform at the FCC, I don't think it has gone far enough, as evidenced as by our bipartisan legislation that is moving.

I appreciate our colleagues working with us to bring about lasting reforms that transcend any chairman of either party at the Commission. We must not buy into the idea that an FCC Chairman will diminish his or her power and work against their own interests there. The FCC is structured to give the Chairman the ability to operate in secret outside the watchful eye of the public it was created to serve. So I entered that into the record.

With the remaining 26 seconds, recognize the vice chairman, Mr. Latta.

[The prepared statement of Mr. Walden follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

Good morning. Thank you for joining us here today to discuss a topic that I have long championed—FCC Process Reform. I'm pleased to announce that Ranking Member Eshoo and I will re-introduce the FCC Process Reform Act. This is a bill that passed the House in the 112th Congress and that the 113th Congress passed unanimously. We are dedicated to improving the way the government does its business and we are introducing this bill again with the hope and expectation that the third time is the charm.

We all agree that things could be better at the FCC. The Commission regulates an incredibly dynamic and innovative sector in the American economy. It ought to serve the public in a transparent and predictable manner. This is the best way to protect consumers and to provide stability for industry and investors. Our bill would set procedural guardrails to protect against the potential for lapses in process.

Specifically, our legislation would set goals for Commission process and would allow the FCC to determine for itself the best way to meet those goals. The objective is to permit the FCC significant latitude in setting its own deadlines and developing performance measures for program activities. The public will be able to measure the Commission's progress by means of annual reports detailing its performance in meeting the deadlines. And, provided that the Commission completes the required rulemaking and inquiry process, the bill will also provide for non-public, collaborative discussions among the Commissioners, which currently are prohibited by the Sunshine in Government Act.

I am also pleased to bring several bills offered by my colleagues across the aisle before the subcommittee for discussion; I applaud their willingness to work with the majority on improving FCC process and I believe there is significant merit to the draft bills offered. We are looking forward to working together on these bills.

Representative Clarke's draft bill requires the FCC to publish a quarterly dashboard marking progress on petitions and complaints at the FCC, allowing the public to determine for themselves how efficiently the FCC is operating. Representative Loeb's bill would require the Chairman to publish the internal procedures at the FCC, which would, for the first time, allow the public to understand how decisions are made when the Commission goes behind closed doors to amend proposed rules. And, Representative Matsui's bill would encourage the FCC to improve access to government for small businesses. These are all fine ideas that can gain bipartisan support and improve the state of the FCC significantly.

Together with the draft bills we discussed at our last legislative hearing, and the consolidated reporting bill that was passed unanimously by the House in February, these are real steps toward a higher standard for transparency of decision-making at the FCC. It is high time. The industry deserves an efficient and effective regulator we can truly call "expert," just as the public deserves a transparent and accountable federal government.

I'd like to thank our guests for being with us today. Mr. May and Prof. Benjamin are both recognized experts in administrative law, and former Commissioner McDowell has the invaluable experience of having been a part of the Commission. Your combined experience and expertise with the FCC make you invaluable advisors on how our proposals may impact the agency and the industries governed by the FCC. We thank you in advance for your insights and look forward to what you have to say.

Mr. LATTA. Well, thank you very much, Mr. Chairman.

And thanks very much to our witnesses for being with us today, really appreciate it, and look forward to your testimony.

The telecommunications industry drives a significant portion of economic growth in our country. Therefore, Congress needs to make sure that this sector is not burdened or hampered by inefficiency or lack of accountability at the FCC. I appreciate the chairman and the subcommittee for keeping FCC transparency, efficiency, and accountability a top priority for continuing an open discussion on agency reform.

I believe the draft bills before us today aim to improve FCC process, and I thank our Democratic colleagues for bringing them forward.

With bipartisan cooperation, this subcommittee can offer reform that will greatly improve agency procedures, which begin with Chairman Walden's and Ms. Eshoo's FCC process reform discussion draft.

I look forward to today's witnesses' testimony and their perspectives on the issues.

And, Mr. Chairman, I yield back.

Mr. WALDEN. Gentleman yields back the balance of his time.

The chair recognizes the gentlelady from California, Ms. Eshoo.

Ms. ESHOO. Good morning, Mr. Chairman, and thank you for convening today's hearing to consider three of the bills put forward by Democrats at our April 30 subcommittee meeting.

And to the witnesses, welcome back to the witness table. It is wonderful to see you. And we look forward to hearing you share your expertise with us, and we thank you for it.

Improving FCC transparency is supported by Members on both sides of the aisle, as well as Chairman Wheeler. In a letter to the subcommittee yesterday, as the chairman just said, the FCC Chairman articulated the agency's planned review of transparency, rule-making, and delegated authority all of which can be done with passing new legislation.

At the same time, your consideration of bills offered by Democrats demonstrates that we can work together to modernize the FCC without jeopardizing regulatory certainty, which is really very, very important, for all that deal with the FCC are opening the door to legal challenges on every Commission action. That is not what we are here for, and I believe that we are staying away from that.

Today, we are also considering the FCC Process Reform Act, a discussion draft I offered with Chairman Walden and Representative Kinzinger, and which passed the House by voice vote in the last Congress. Importantly, this compromise bill gives the FCC flexibility to evaluate and adopt procedural changes to its rules rather than putting rigid requirements in statute.

I also welcome the inclusion of the FCC Collaboration Act. Obviously, I do. It is a bipartisan bill I introduced earlier this year with Representatives Shimkus and Doyle. But an artificial delay of this particular provision as the discussion draft establishes, I think, is an unnecessary delay, and I think it is an odd one. If we are taking it up, let's get it done, because it is a much needed reform. All the commissioners of the FCC have testified on this, and I think that we need to address this prior to passage of any package.

Finally, it is disappointing to me that the majority has chosen not to consider H.R. 2125, the Keeping Our Campaigns Honest Act. This was part of the package of bills offered by Democrats at the subcommittee's April 30 hearing. Recent election cycles and waves of spending by secret donors have made it painfully clear that our electoral system and our campaign finance laws are in the drastic need of reform.

In the long term, it will take Supreme Court decisions or a constitutional amendment to rid our political system of endless sums of money. But, in the short term, we can and should start by requiring that all political ads spending be fully transparent and clearly disclosed. Now, I think the operative word in this is "transparency." At our last hearing, many members spoke so eloquently about transparency.

Mr. Chairman, you have emphasized transparency, and yet, when it comes to this, no transparency.

So full disclosure is an idea that once enjoyed bipartisan support. Justice Anthony Kennedy in the Citizens United case wrote for the majority, quote, "The First Amendment protects political speech, and disclosure permits citizens and shareholders to react to the speech of cooperate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages," unquote.

Even Senator Mitch McConnell agreed, asking in 2000, why would a little disclosure be better than a lot of disclosure? Consistent with the FCC's existing authority, I think it's time for the agency to bring greater transparency to America's electoral system by requiring sponsors of political ads very simply to disclose their true identity, not just their ambiguously named Super PAC.

The public has a right to know who is attempting to persuade them over the public airwaves—public airwaves—and Representative Yarmuth's bill would achieve that goal by casting light and transparency on election advertising.

So there you have it, the good and the not-so-good. I welcome, again, our witnesses back to the subcommittee. And your expertise on how to ensure FCC flexibility while promoting openness, transparency, and accountability is very important for us. Thank you.

And I yield back, Mr. Chairman.

Mr. WALDEN. Gentledady yields back the balance of her time.

I don't believe anyone is claiming the time for the chairman of the committee, so I will recognize the ranking member on the committee, Mr. Pallone.

Mr. PALLONE. Thank you, Chairman Walden and Ranking Member Eshoo.

And welcome to our witnesses. I know all of you have been here before to help us with these issues, and I appreciate your coming back.

This is the second time in the past few years that this subcommittee has focused on perceived shortcomings at the FCC. At our hearing a couple weeks ago, we heard testimony from FCC Chairman Wheeler about the extensive work he has already done to update the FCC's internal processes, but more could always be done. And that is why Chairman Wheeler committed to us that he would continue to work with his fellow Commissioners to comprehensively review all of the internal procedures at the agency.

We also heard at the last hearing that the Democratic members of this subcommittee have a number of concerns with the FCC process reform proposals the Republicans put forward. The most serious concern was that these proposals run counter to the repeated warnings from legal experts that creating agency-specific reforms invite lawsuits which create uncertainty and deter investment.

But rather than simply throw our hands up in opposition, we offered an alternative approach to keep the FCC fast, efficient, and transparent. And our commonsense proposals would keep the FCC as agile as the industries it regulates, without sparking years of legal uncertainty.

I hope the Republicans understand our concern, and I am grateful that Chairman Walden is willing to give some of our proposals a fair hearing. But I do want to join with Ms. Eshoo and express disappointment that this hearing does not include all of our proposals, including the one presented by Mr. Yarmuth, and that is because transparency should extend to the political process as well as the FCC's internal process.

That is why our alternative package includes a way to ensure that the public knows who is paying for expensive political ads on TV. Americans deserve to know who is using the public airwaves

to influence political debates, and transparency should not stop at the doors of the FCC.

But I want to thank both of my colleagues again.

I would like now to yield the remainder of my time to the gentlewoman from California, Ms. Matsui.

Ms. MATSUI. I thank the ranking member for yielding me time. I would like to thank the witnesses for being with us today.

We all agree here that transparency and efficiency at the FCC is a good thing, and I am pleased that my draft bill is being considered today to make it easier for small businesses in Sacramento and across the country to engage with the FCC on policies that may impact them. Whether it is a family business or a startup, small businesses can't spend scarce resources on lawyers or lobbyists to have an impact on FCC decision. But, in most cases, their companies will be affected by FCC decisions just as much as larger corporations. We should make it as simple as possible for the small businesses to have their voices heard at the FCC. My draft bill would have the FCC coordinate with the Small Business Administration to improve small business participation at the FCC.

Mr. Chairman, I would like to submit for the record a letter of support from the Small Business Coalition comprised of rural and travel carriers for this legislation.

Mr. WALDEN. Without objection.

[The information appears at the conclusion of the hearing.]

Ms. MATSUI. This is a commonsense bill that I hope my colleagues will support.

And I yield back the balance of my time.

Mr. WALDEN. Gentlelady yields back the balance of her time.

Mr. Pallone, goes back to you, I think.

Mr. PALLONE. I yield back.

Mr. WALDEN. He yields back.

And so, with that, we will move onto our witnesses. And I appreciate my colleagues' testimony or opening statements. Three out of four minority party bills up for consideration is not a bad ratio when you are in the minority.

Let me move on now to Mr. Randy. Just making a note here. I wish we had gotten three-quarters of our bills when we were in minority, but oh well.

Randy May, President, Free State Foundation. Take it away. Good morning.

Mr. MAY. Mr. Chairman—

Mr. WALDEN. But we do need you to turn that mic on. Just once.

Mr. MAY. Mr. Chairman. Well, that doesn't work either.

Mr. WALDEN. Can we get somebody over there who actually knows how to—no, I don't think it is on.

With that, Mr. May, please, go ahead and start your testimony.

STATEMENTS OF RANDOLPH J. MAY, PRESIDENT, FREE STATE FOUNDATION; STUART M. BENJAMIN, DOUGLAS B. MAGGS CHAIR IN LAW AND ASSOCIATE DEAN FOR RESEARCH, DUKE LAW; AND ROBERT M. MCDOWELL, FORMER FCC COMMISSIONER, SENIOR FELLOW, HUDSON INSTITUTE

STATEMENT OF RANDOLPH J. MAY

Mr. MAY. Mr. Chairman, Ranking Member Eshoo, and members of the committee, thank you for inviting me to testify. I am President of the Free State Foundation, a nonpartisan think tank, that, among other things, focuses its research in the communications law and policy and administrative law areas. As my written testimony details, I have longstanding experience in these areas. So today's hearing on process reform is at the core of my expertise.

Mr. Chairman, as we were discussing earlier, all three of the witnesses today happen to have strong Duke connections, Duke University, but I want to point out that I am the only one of my Duke friends here that has two Duke degrees, so I hope you will consider that when you are weighing my testimony.

I commend Chairman Walden and the committee for your efforts to focus on process reform over the years, in addition to the important work undertaken as part of the Comms Act update process to reform the substance of our communication laws. I have supported the Commission's earlier process reform efforts, and I support the current efforts aimed at increasing FCC transparency.

Alexander Bickel, one of the 20th century's most prominent legal scholars, wrote in his 1975 book, "The Morality of Consent," that "The highest form of morality is almost always the morality of process."

Sound process is crucial to ensuring accountability, conforming to rule-of-law norms, maintaining public confidence in the decision-making of our administrative agencies, and increasing administrative efficiency.

This is especially so because the FCC's decisions, which impact the public in significant ways, are made by unelected decision-makers who are not directly accountable to the public. While I applaud the sentiments that Chairman Wheeler has expressed regarding process reform, the reality is that the Commission's own efforts have fallen short of what needs to be done.

If enacted, the draft bills that are the subject of this hearing would constitute important steps forward in reforming the Commission's processes, and I find little in them to disagree with. The FCC Process Reform Act of 2015, which requires the Commission to initiate proceedings either to adopt procedural changes or to seek public comment on whether and how to implement other changes, is commendably comprehensive.

That said, I believe Congress should adopt some key specific reforms now without waiting any longer for the Commission to act on its own. So I want to use my remaining time to support the proposals in the drafts produced by Representatives Latta, Kinzinger, and Ellmers. By increasing transparency, these bills promote rule-of-law norms, enhance public confidence in the integrity of the agency's decisionmaking, and increase the Commission's efficiency.

In some quarters, Representative Kinzinger's proposal requiring advance publication of items to be considered by the Commission at a Sunshine meeting provokes controversy, but it should not. Indeed, it should seem odd that in advance of a so-called Sunshine meeting, the text of the document the Commission is voting on is kept out of the public's hands, in the dark.

When Commissioners read their prepared statements, the public can only guess at the substance of what is being addressed. There is no reason why, subject to the usual exemptions regarding privilege, that the text of the document to be voted on should not be released in advance of the meeting. Inevitably, there are often leaks concerning the proposed text of items, some accurate and some not.

Some members of the public, by virtue of position, proximity, or personal relationships, may receive more or better information concerning the proposed text than others. This does not inspire public confidence in the integrity of the Commission's decisionmaking, and it doesn't enhance the soundness of the Commission's decisions.

As Commissioner O'Reilly has pointed out, in discussions with members of the public prior to the Sunshine cutoff quiet period, the inability to talk in specifics about the proposed item inhibits the usefulness of exchanges with the public that might produce better, more informed decisions. Aside from whatever specific time period is selected, Representative Ellmers' bill, that the text of rules adopted by the Commission be published online in a timely fashion, constitutes a useful reform.

In light of legitimate concerns regarding the abuse of the FCC's ubiquitous grant of editorial privileges to the staff at the time of adoption of agenda items, there should be some action forcing publication requirement to help ensure that the rules before the Commission at the time of the vote in all material respects are rules that will become the official agency action. If this is not the case, then the very purpose of the Sunshine Act is vitiated, for the public is not actually witnessing a vote on the actual item that is going to be adopted by the Commission.

Finally, in closing, Representative Latta's bill to require that items to be decided pursuant to delegated authority be identified on the agency's Web site at least 48 hours in advance ought to be noncontroversial. While it is appropriate for many items that do not present novel or significant questions to be decided by the staff, the Commissioners nominated by the President and confirmed by the Senate have the ultimate decisionmaking authority on matters within the Commission's jurisdiction. So a Commissioner should have the opportunity to vote if they wish on all matters on which official agency action is taken, and Representative Latta's bill is a means to effectuate that opportunity.

Thank you for giving me the opportunity to testify today, and I will be pleased to answer any questions.

[The prepared statement of Mr. May follows:]



Testimony of Randolph J. May

President, The Free State Foundation

Hearing on “FCC Reauthorization: Improving Commission Transparency Part II”

before the

Subcommittee on Communications and Technology

Committee on Energy and Commerce

U.S. House of Representatives

May 15, 2015

Testimony of Randolph J. May
President, The Free State Foundation

Mr. Chairman, Ranking Member Eshoo, and Members of the Committee, thank you for inviting me to testify. I am President of The Free State Foundation, a non-profit, nonpartisan research and educational foundation located in Rockville, Maryland. The Free State Foundation is a free market-oriented think tank that, among other things, focuses its research in the communications law and policy and administrative law and regulatory practice areas. Especially relevant to today's hearing, by way of background I wish to note that I have served as Associate General Counsel at the Federal Communications Commission. I am a past Section Chair of the American Bar Association's Section of Administrative Law and Regulatory Practice and its representative in the ABA House of Delegates. I am currently a public member of the Administrative Conference of the United States and a Fellow at the National Academy of Public Administration. So, today's hearing on FCC process reform, with its particular focus on improving Commission transparency, is at the core of my longstanding experience and expertise in communications law and policy and administrative law and regulatory practice.

I testified before this Committee on the subject of "Reforming the FCC Process" on June 22, 2011, and July 2013, and I appreciate the opportunity to testify today. I commend Chairman Walden and members of the Committee for their efforts to focus on process reform at the FCC in addition to the commendable work the Committee is undertaking as part of the #CommActUpdate process to reform the substance of our nation's outdated communications laws.

I have generally supported the earlier process reform efforts, such as the Federal Communications Commission Process Reform Act of 2015, which was passed by the House but died in the Senate. And I certainly support legislative efforts that would require the FCC to increase the transparency of its processes. Alexander Bickel, one of the twentieth century's most prominent constitutional and public law scholars, wrote in his 1975 book, *The Morality of Consent*, that "the highest form of morality is almost always the morality of process." Without debating whether sound process is *the* highest form of morality, it is certainly crucial to ensuring accountability, conforming to rule of law and due process norms, and maintaining public confidence in the decision-making of our federal administrative agencies like the FCC. This is especially so because the FCC's decisions, which impact the public and regulated parties, often in significant ways, are made by unelected decision-makers who are not directly accountable to the public.

Since becoming Chairman of the Commission, Tom Wheeler has often touted his desire to reform the agency's processes, including increasing transparency. For example, at a May 20, 2014, oversight hearing before this Committee, Mr. Wheeler said process reform was a priority, and added: "In order to keep up with the rapid pace of change in the industries that we oversee, we must hold ourselves to a high standard to be as agile, efficient, and *transparent* as possible." I could cite other of his statements to this same effect. Without belaboring the point here, I will say this: While I applaud Mr. Wheeler's sentiment, and while he is correct that sound process impacts the ability of the agency to reach good decisions in an efficient manner, in my view the Commission's own process reform efforts have fallen far short of what needs to be done. Indeed, during the past year

or so, “process failures” appear to have increased.¹ This is why this Committee’s efforts are vitally important.

If enacted, the draft bills that are the subject of this hearing would constitute important steps forward in reforming the Commission’s processes and, frankly, I find little in them to disagree with as a matter of substance. The draft “Federal Communications Commission Process Reform Act of 2015,” which requires the Commission to initiate proceedings either to adopt procedural changes or to seek public comment on whether and how to implement other changes, is commendably comprehensive. As I outline below, I believe Congress should adopt some key specific reforms now, without waiting any longer for the Commission to act on its own. But, before doing so, I especially want to note the provisions in the Discussion Draft that require the Commission, in a rulemaking, to establish policies concerning the submission of new comments, reports, and data towards the end of the comment period and after the comment period; to establish procedures for including the specific language of the proposed rule in the rulemaking notice; and to establish requirements for including performance measures for evaluating the effectiveness of Commission program activities. These are common-sense reforms that should be adopted by the agency, and it shouldn’t take a year for the Commission to adopt new rules.

With regard to the inquiry required by proposed Section 13(a)(3), the specific proposals, in and of themselves, are commendable. Each would either enhance the efficiency of the Commission’s processes or increase transparency regarding the agency’s work. This is true, for example, of the proposals to allow a bipartisan majority of

¹ The Memorandum of the Committee Majority Staff, dated April 28, 2015, prepared in conjunction with the April 30, 2015, Part 1 Transparency hearing, details several instances of meaningful process failures during the past fourteen months.

Commissioners to place an item on the Commission's meeting agenda; to require publication of agency decisions within 30 days of their adoption; and to establish procedures for publishing the text of agenda items to be voted on at an open meeting in advance of the meeting.

As I said above, there is no reason why Congress should not act now to adopt certain reform measures. Indeed, without necessarily endorsing all of the specifics, such as particular deadlines, in each bill, I support the conceptual proposals contained in the Discussion Drafts produced by Vice Chairman Latta and Representatives Kinzinger and Ellmers. These bills, by increasing the transparency of the Commission's processes, would promote rule of law and due process norms, enhance public confidence in the integrity of the agency's decision-making, and increase the Commission's efficiency.

In some quarters, Rep. Kinzinger's proposal requiring advance publication of items to be considered by the Commission at a Sunshine meeting provokes the most controversy. But it should not. Indeed, it should seem odd that at, and in advance of, a so-called Sunshine meeting, the text of the document the Commission is voting on is kept out of the public's hands – in the dark. When the Commissioners read their prepared statements (there are almost never any meaningful unrehearsed exchanges among the Commissioners),² the public can only guess at the substance of what is being discussed. And there is no reason why, subject to the usual exemptions regarding confidentiality and

² This is why, in conjunction with the other reforms I discuss, I favor changes in the Sunshine Act to allow collaborative discussions among three or more Commissioners as proposed in the Walden, Eshoo, Kinzinger Discussion Draft. In 1995, I chaired a Special Committee of the Administrative Conference of the United States which proposed Sunshine Act reforms, and I have been an advocate of such reforms ever since. See Randolph J. May, *Reforming the Sunshine Act*, 49 AD. LAW REV. 415 (1997), may be accessed at: http://freestatefoundation.org/images/ABA_Ad_Law_Review___Reforming_the_Sunshine_Act.pdf

privilege, that the text of the document to be voted on at the Sunshine meeting should not be released in advance of the meeting date at the time the item is circulated to the Commissioners, or at least substantially in advance of the meeting. Inevitably, there are often leaks concerning the proposed texts of Commission items, some accurate and some not, some with winks, some with nods. Some members of the public, by virtue of position, proximity, or personal relationships, may receive – or appear to receive – more or better information concerning the proposed texts than others. This does not inspire public confidence in the integrity of the Commission’s decision-making. And it doesn’t enhance the soundness of the Commission’s decisions either. As Commissioner O’Rielly has pointed out, in discussions with members of the public prior to the Sunshine cut-off quiet period, the inability to talk in specifics about the proposed item inhibits the usefulness of exchanges with the public that might produce better, more informed decisions. Importantly, Rep. Kinzinger’s bill makes clear that nothing in his proposal may be construed to prevent the Commission from making changes to the text after its release.

I mentioned at the beginning of my testimony that I am a Public Member of the Administrative Conference of the United States (ACUS). As President Obama has proclaimed, “ACUS is a public-private partnership designed to make government work better.” It has a bipartisan membership that is composed of agency officials, scholars, non-profit leaders, and private sector representatives. I want to call your attention to ACUS Recommendation 2014-2, “Government in the Sunshine Act,” adopted June 5, 2014. The Recommendation is intended to highlight a number of “best practices”

undertaken by agencies covered by the Sunshine Act and to encourage others to consider and implement them as appropriate. Recommendation 2 is especially relevant:

For open meetings, covered agencies should post a meeting agenda on their websites as far in advance of the meeting as possible. **Except for documents that may be exempt from disclosure under the Freedom of Information Act, agencies should also post in advance all documents to be considered during the meeting.** When an agency cannot post non-exempt meeting documents in advance, it should do so not later than the start of the meeting or in a timely manner after the meeting has occurred. (Emphasis added.)³

While the Recommendation does not suggest how far in advance the documents to be considered at the meeting should be publicly posted, Rep. Kinzinger's draft is certainly consistent with the ACUS "best practices" recommendation.

The Research Report accompanying the Recommendation found, upon the basis of a survey of the ACUS-coordinated Council of Independent Regulatory Agencies (CIRA), that many independent agency officials pointed to the electronic posting of agency documents relevant to open meetings as worthwhile, in the same way that all documents, including drafts, working papers, and agenda items, which are prepared for consideration by Federal Advisory Committees, must be made available for public inspection. With respect to matters to be considered at a Sunshine meeting, the Report states:

Documents that agencies post in connection with open meetings include the following: meeting notices (including Federal Register notices announcing upcoming meetings), press releases, meeting agendas, staff memoranda to be considered at meetings, meeting transcripts and/or minutes, public comments received by the agency, and background documents needed to comprehend the meeting discussions (e.g., briefs and copies of relevant past decisions for an

³ ACUS Recommendation 2014-2 may be accessed at:
<https://www.acus.gov/recommendation/government-sunshine-act>

adjudication undertaken by a multi-member agency).

Ideally, staff memoranda, public comments, and other background documents that may be beneficial for stakeholders and interested members of the public who wish to study the matters to be addressed at the meeting should be released in advance of the meeting, preferably providing interested parties sufficient time to review the materials and analyze the issues to be addressed at the meeting.⁴

In my view, the FCC certainly should adopt the ACUS-recommended “best practice” of posting the text of open meeting agenda items in advance of the public meeting so that the public is fully informed concerning what the agency is considering doing, supposedly in the Sunshine.

It should not be surprising that another Recommendation 2014-2 “best practice” urges that agencies endeavor to post online meeting minutes or transcripts in a timely manner after the meeting.⁵ Aside from whatever specific time period is selected, this is consistent with the requirement in Rep. Ellmers’ draft bill that the text of rules adopted by the Commission be published online within 24 hours of adoption. In light of legitimate concerns regarding the abuse of the FCC’s ubiquitous grant of “editorial privileges” to the staff at the time of adoption of agenda items, there should be some action-forcing publication requirement to help ensure that the item before the Commission at the time of a vote, in all material respects, is the order or rule that, per the vote, will become the official final agency action. After all, if this is not the case, then the very purpose of the Sunshine Act is vitiated – if not violated – for the public is not actually witnessing a vote on the actual agency item.

⁴ The Research Report may be accessed at:
<https://www.acus.gov/sites/default/files/documents/Government%20in%20the%20Sunshine%20Act%20Draft%20Report%20REVISED%205-7-14.pdf>

⁵ Recommendation No. 5.

Rep. Latta's draft bill to require that items to be decided pursuant to delegated authority be identified on the agency's website at least 48 hours in advance certainly makes sense and ought to be non-controversial. While it is appropriate for many items that do not present novel or significant questions to be decided by the staff, the Commissioners, nominated by the President and confirmed by the Senate, have the ultimate decision-making authority on matters within the Commission's jurisdiction. So, it is imperative that the Commissioners have an opportunity to vote, if they wish, on all matters on which official agency action is taken. Commissioner O'Rielly's recent blog, "Delegated Authority: Serious Objections and Solutions," addresses the "customary," but not uniform, practice whereby some bureaus, at least at some times, notify Commissioners in advance of an action's release on delegated authority.⁶ By codifying the customary 48-hour rule, Rep. Latta's bill would increase transparency, and accountability to the public because, as the Commission's website proclaims, "[t]he FCC is directed by five commissioners appointed by the president of the United States and confirmed by the U.S. Senate for five-year terms."

In sum, there is a real need for reform of the FCC's processes, and, as outlined above, I applaud and support the efforts of this Committee to adopt measures that would accomplish such reforms. Indeed, while I see no need to condition adoption of the proposals in the Latta, Kinzinger, and Ellmers draft bills, if necessary to overcome objections to near-term adoption, I suggest that some form of a "sunset" date might be considered, say 3-5 years, so that the results of these reforms may be evaluated after they

⁶ FCC Commissioner Michael O'Rielly, "Delegated Authority: Serious Objections and Solutions," February 2, 2015, may be accessed at: <https://www.fcc.gov/blog/delegated-authority-serious-objections-and-solutions>

have been in effect for some period of time. While I have little reason to doubt that these reforms, by increasing transparency, will accomplish their intended purposes without producing negative consequences, if I am wrong then Congress can evaluate the results and make any necessary adjustments.

Thank you for giving me the opportunity to testify today. I will be pleased to answer any questions.

Mr. WALDEN. Thank you, Mr. May. We appreciate that.

If you will slide that microphone over, we will go to Stuart Benjamin, the Douglas B. Maggs Chair in Law and Associate Dean for research at Duke Law.

Mr. BENJAMIN. They all work now, I think.

Mr. WALDEN. Yes, you are on.

Mr. BENJAMIN. Great.

Mr. WALDEN. Good morning.

STATEMENT OF STUART M. BENJAMIN

Mr. BENJAMIN. Chairman Walden, Ranking Member Eshoo, members of the subcommittee, thanks for having me. So my background in many ways revolves around the FCC.

I teach administrative law, telecommunications law, First Amendment law. I am coauthor of a telecommunications casebook. From 2009 to 2011, I served as the inaugural distinguished scholar in residence at the FCC, a title you can blame on Commissioner McDowell here who suggested it and who actually had first suggested to me in 2006: You should go work at the FCC maybe.

But any event, more recently, I have been periodically serving the Commission as a consultant, but I want to emphasize, I have not spoken to anybody in the Commission about any testimony in any of these bills. I have no clients. I have had no clients since I became an academic. Nobody has paid me for this testimony. I don't do any private consulting, et cetera.

OK. So all the bills that are the focus today and the three bills that the subcommittee considered on April 30 avoid most of the most serious concerns that I raised in 2013. So I think I commend you all for—it seems to me that they have moved in a very useful direction. I think it makes a lot of sense, for instance, to tell the FCC: Here is what we want you to do. We are making the big policy decisions. You implement them.

I also think it makes a lot of sense to focus on disclosure rules. Some disclosures can do more harm than good and actually inhibit effective decisionmaking processes, but many forms of disclosure have little or no such inhibiting effects on decisionmaking processes and may well make both members of the public and Members of the Congress understand better what is going on at the Commission.

I do have some reservations. They are pretty modest in the grand scheme of things, but I would be remiss if I didn't lay them out. The first, the same I mentioned in 2013, I know this committee's jurisdiction, but I simply have to say it because it is my view of the world. I think it is a better approach if you have reforms you think make sense to apply them across the board.

This is not just a fetish. It is that this allows for judicial resolution more quickly than of the issues that any particular piece of legislation creates. And so the greater the specificity, the longer it takes the courts to work out exactly how that is going to apply.

Second, as I said, I think this largely avoids the concerns I raised in 2013 about litigation risk. There are some provisions here that create some uncertainty and some litigation risk. They are not huge. I mentioned one in my written statement that there is a reference to how the FCC is going to handle extensive new comments.

So the FCC is going to have to define now what are extensive new comments, and then there is going to be litigation about what constitutes extensive new comments.

Third, I think that one section of the bill is in some tension with Representative Kinzinger's draft bill, that is the section 13(a)(3)(c) of this bill says: Want to make sure that all Commissioners get a full chance to review FCC orders, et cetera. Representative Kinzinger's bill says: Within 24 hours of an order being circulated to all the Commissioners, it has to be circulated to the public, and then good-faith changes can be made after that.

So the trigger is, now we have to justify changes after it goes to the public. Why do I highlight this? Because for Commissioners, the best opportunity for them to respond is when they have actually gotten formal receipt and they can have contact. And, by the way, and if we could have changes in the Sunshine Act, they could actually even meet among themselves in groups greater than two and not have to switch to talking about the Nationals whenever a third walks up. But that is the best opportunity. And now we have actually raised the cost of changes because now you have to justify these as good-faith changes.

A couple other things, let me just mention quickly. One is that section 13(a)(2)(c) is the one that says if there are submissions received after the comment window, then the public gets to respond to those. There is a possibility then for an endless loop, right. So the public responds with new submissions, then those need to be responded to, et cetera.

And the way to avoid that problem, it seems to me, is for the FCC simply not to receive submissions after the comment window. But the question then is, sometimes things happen after the comment window; technology is changing all the time. Don't we want the FCC to have the latest information, the most pieces of information when it is making its decisions.

Finally, let me just mention that the requirement in 13(a)(2)(g) requiring that notices of proposed rulemaking contain the specific language of the proposed rule, let me simply note this will cement the transition of the formal rulemaking process from a rulemaking to a rule-adopting process. That is to say, what that really means is, all the relevant decisions will have been made before the comment process, before the NPRM.

And that might be a better world in some ways; we might think public comments can only move the Commission at the margin or move any agency at the margin, but it does mean that the agency has to have fully baked its whole rule before it actually begins the public comment process.

Anyway, let me desist with that. And thank you very much for your time.

[The prepared statement of Mr. Benjamin follows:]

TESTIMONY OF
STUART MINOR BENJAMIN
DOUGLAS M. MAGGS PROFESSOR OF LAW
DUKE LAW SCHOOL

Before the
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
of the
UNITED STATES HOUSE OF REPRESENTATIVES

on
FCC REAUTHORIZATION: IMPROVING COMMISSION TRANSPARENCY PART II
May 15, 2015

Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, thank you for the opportunity to testify before you today.

The Commission and its processes have been at the center of my academic career. My core research and teaching areas are telecommunications law, administrative law, and the First Amendment. I have written many law review articles on these topics and am the coauthor of *Telecommunications Law and Policy*, a legal casebook now in its fourth edition. From 2009 to 2011 I was the inaugural Distinguished Scholar at the Commission. More recently I have been periodically serving the Commission as a consultant. I should add that I have not discussed my testimony or the bills at issue today with anyone at the Commission. Beyond that, I am not being compensated for my testimony in any way, either directly or indirectly. I have no clients (paid or unpaid), nor have I had any clients or consulting relationships since I became an academic in 1997.

I will refer to the Federal Communications Commission Process Reform Act of 2015 as “the bill,” and the section numbers I list below will refer to that bill. But I will touch on the other bills that you are considering as well.

There is much to be said for the bills you are considering. Agencies’ processes are tremendously important, and I think you are wise to carefully consider those processes. All the bills, including the four bills that are the focus today and the three bills on which this Subcommittee’s April 30 hearing focused, avoid many of the most serious concerns I raised about the Federal Communications Commission Process Reform Act of 2013, on which I testified before you in July 2013. I think it makes a great deal of sense to direct the Commission to develop rules, rather than to have Congress impose specific rules. Congress thus makes the central policy choices and the agency writes rules to implement them. Beyond that, the bills largely avoid creating novel legal regimes and wisely focus on disclosure. Disclosure is not costless, of course. As I will note below, some disclosures can do more harm than good, because they inhibit effective decisionmaking processes. But many forms of disclosure, including many in the bills you are considering, have little or no such inhibiting effects and more generally have modest costs. Such disclosures can have real benefits, in terms of public confidence and congressional oversight, and thus are attractive. The draft bills of Representative Clarke, Representative Loeb sack, and Representative Matsui may fall into this category.

I do have some modest reservations about aspect of the bills you are considering, to which I now turn.

Specificity to the FCC

One basic point that I raised in 2013 remains: If the proposals are a good idea, they should not be limited to the FCC. One of the great advantages of the Administrative Procedure Act (“APA”) is that it applies the same rules to all agencies, allowing agencies to learn from each other and leading to the development of a jurisprudence that applies to all agencies. The goals underlying many provisions of the bill would seem to apply with equal force to all agencies, and there is no obvious reason why these provisions should be limited to the FCC. Applying them only to the FCC moves away from the APA’s valuable unification of agency procedures and standards.

For instance, let me highlight the provision in the bill that I most strongly support. Section 13(c), allowing nonpublic collaborative discussions, is a great idea. I think virtually every administrative lawyer and law professor would agree that disclosure requirements entailed in 5 U.S.C. § 552b have hampered effective communications among Commissioners and should be modified. It is inefficient that Commissioners cannot have meaningful substantive discussions among themselves outside of public Commission meetings and so must send their staffs to consult and coordinate. But the arguments for this proposal apply to all multimember agencies. I do not see any reason why new rules on nonpublic collaborative discussions should be limited to the FCC.

Uncertainty

As I noted above, the bills you are considering ameliorate many of the concerns I raised in 2013 about novel legal requirements that open the door to litigation and uncertainty. But a few

of the provisions give rise to similar concerns. For instance, the Commission will have to define what constitutes “extensive new comments” (a term that does not appear in the United States Code) in § 13(a)(2)(B), and then await judicial review of its definition and implementation of that term. New legal standards often make sense, because their benefits often outweigh their costs. Maybe the new legal standards in these bills have benefits that exceed their costs. But novelty does give rise to costs in the form of uncertainty and litigation. And limiting the new standards to the FCC will increase this period of uncertainty. With new standards applicable to only one agency, establishing a set of agency practices and set of judicial standards could take years.

Review by All Commissioners

Section 13(a)(3)(C) requires the establishment of procedures to ensure that Commissioners have adequate time to review proposed rules. That seems to be at cross-purposes with another bill you are considering, Representative Kinzinger’s draft bill. That bill requires that proposed rules be published on the Internet within 24 hours of circulation to other Commissioners, and allows only “good faith changes” afterwards. So Commissioners could (along with the public) review proposed rules, but the Commission would have to justify any changes that such review produced. The point at which Commissioners review proposed rules and suggest changes would be the point at which such changes would become more difficult to make. This is, I think, a recipe for less meaningful review by other Commissioners, which is in tension with § 13(a)(3)(C)’s emphasis on increasing Commissioners’ ability to review, and presumably suggest changes to, proposed rules.

Adding Rounds to the Process

Some provisions of the bills you are considering may dramatically extend the rulemaking process. Section 13(a)(2)(C) in particular exemplifies this. It requires the establishment of policies to ensure that the public has notice of and an opportunity to respond to submissions received after the comment period on which the FCC relies. If the Commission wants to rely on any of these responsive submissions, it would be required to disclose these new submissions and afford the public an opportunity to respond to *them*, and so on. (Indeed, reliance does not appear to be necessary: the provision requires the establishment of policies regarding the treatment of submissions “after the comment period to ensure that the public has adequate notice of an opportunity to respond to such submissions before the Commission relies on such submissions.” In other words, an opportunity to respond apparently must exist for all submissions, in case the Commission relies on them. So receipt of submissions appears to entail a requirement of an opportunity for further submissions.) And if a court required the Commission to take a hard look at all the arguments and data in each new set of submissions, the rulemaking process might never conclude. That said, a court might recognize that application of hard look review could create an endless process, and thus treat § 13(a)(2)(C) as weakening hard look review for the FCC in this context (on the reasoning that the specific trumps the general). But then we are back to the problem of having a special set of rules for the FCC – here, modifying one of the core provisions of the APA *sub silentio*.

The Commission could avoid this possibly endless process by refusing to rely on, or even accept, any submissions after the comment window has closed, but I am not sure we want agencies to ignore valuable new data. In an area like telecommunications, new developments are

occurring all the time, and the Commission should rely on the most accurate and up to date information in making its decisions. Simply stated, under § 13(a)(2)(C) the Commission will either face a potentially endless process (submissions leading to responsive submissions, leading to yet further submissions, and so on) or will have to ignore potentially valuable information that becomes available after the comment window has closed.

Decisionmaking Before the Public Comment Process Occurs

Section 13(a)(2)(G)'s provision that a notice of proposed rulemaking shall contain the specific language of the proposed rule will cement the transformation of the rulemaking process into a rule adopting process. In the first decades after Congress enacted the APA, notices of proposed rulemaking were often very brief, and frequently simply outlined the issue and its possible resolution. Starting in the early 1970s, judicial opinions began to require so much information and guidance in notices of proposed rulemaking that agencies were effectively required to do most of their analysis before they issued a notice of proposed rulemaking. One result of these judicial rulings was that the public comment period under § 553 of the APA came after the agency had made the most important decisions, because those decisions were made before the notice was issued. Section 13(a)(2)(G) will largely complete this transformation, as the agency will be required to have written an entire proposed order as part of its notice before the § 553 comment period begins. Some might welcome this transformation, on the theory that there are advantages to the publication of a proposed rule before the public comments, and that it is fine to diminish the role of comments from the public during the rulemaking process because

such comments do not make much difference, anyway. But it is a remarkable transformation from where the rulemaking process started.

I hope these comments have been useful. I will be happy to respond to any questions that you may have.

Mr. WALDEN. Thank you very much, Mr. Benjamin. We appreciate your coming up for our hearing today.

Now, we will turn to our final witness, the Honorable Robert McDowell, former SEC Commissioner and a senior fellow at the Hudson Institute.

We welcome you back before the committee.

STATEMENT OF ROBERT M. MCDOWELL

Mr. MCDOWELL. Mr. Chairman, thank you for having me back. It is an honor and privilege to be here.

And Ranking Member Eshoo and all the members, thank you. It is good to be back here.

First, all the disclaimers: Today, I am testifying only in my personal capacity and not on behalf of the Hudson Institute or the law firm of Wiley Rein or any of its clients, and the thoughts I express today are purely my own. And I have stapled to the back of my testimony a lot of other FCC reform ideas I wrote about as a Commissioner and have testified about with you in this room and downstairs and elsewhere.

So, when I was an FCC Commissioner, we had many positive and constructive conversations with this committee and with each other about FCC reform. And one of the refreshing aspects that has already been touched upon today of this topic is the tremendous potential this topic offers for bipartisan cooperation to find solutions in the spirit of pursuing good government.

It can be done because it has been done. For example, former Acting Chairman of the FCC Mike Copps and I collaborated on many reform efforts back in 2009, including the modernization of the FCC's ex parte rules and proposed changes to the Sunshine in Government Act. And, similarly, Chairman Genachowski and I worked together in many other matters as well.

And I do note that with great enthusiasm, we have several bills and discussion drafts written on both sides of the aisle that are being considered by this committee, and good ideas abound. Without offering a specific endorsement, I will endorse the spirit and theme in some of the ideas here today. So I applaud the committee for its energy and good faith that you are putting behind this effort.

The bottom line on reform efforts however is that they should be based on the principles of sound due process, transparency, accountability, fairness, and efficiency. And I am going to edit out because I know we are behind schedule some of what I was going to say, but I would like to add, there are a few ideas that I have talked about over the years that the Commission should be required to justify new rules with bona fide cost-benefit analyses. New rules perhaps should sunset after a defined period of time and that renewal should be justified from scratch in a new proceeding.

And it is precisely because the communications marketplace is evolving so rapidly. Technology is coming out of Congresswoman Eshoo's office, and other districts here are really just abounding and changing by the second.

But also I think we need to look at merger reviews. When the Commission intends to deny a merger, the parties should be able to go to court for review after waving the costly and time-con-

suming hearing process. And also mergers, I think, should have a bona fide shot clock, obviously with some exceptions for extraordinary circumstances.

And I do agree that the Sunshine in Government Act should be modernized so that more than two Commissioners can talk about substance. That would actually help a lot of what we are talking about here. At the end of the day, Commission orders have to be well reasoned and are disclosed and are appealable, of course, to the courts. So it is not a secret as to how the Commission is arriving at a decision, but that should be fixed as well.

And, lastly, I would be remiss if I didn't reiterate my call for Congress to rewrite our country's creaky and antiquated communications laws. The 1934 act will celebrate its 81st birthday next month, and the 1996 act is almost 20-years-old, which reminds me of my 20th wedding anniversary. We were married in 1996, so it is always good to keep those in mind.

But a lot has changed in just the last few weeks, let alone the last 81 years. We need to modernize our communications laws to reflect current market conditions and technologies. So thank you again for having me here today. It is a tremendous honor to be here, and I look forward to answering your questions.

[The prepared statement of Mr. McDowell follows:]

STATEMENT
OF
THE HON. ROBERT M. MCDOWELL
SENIOR FELLOW
HUDSON INSTITUTE
CENTER FOR THE ECONOMICS OF THE INTERNET

FCC REAUTHORIZATION:
IMPROVING COMMISSION TRANSPARENCY
PART II

BEFORE THE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
COMMITTEE ON ENERGY & COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

MAY 15, 2015

Thank you Chairman Walden, Ranking Member Eshoo and Members of the Committee - it is an honor to testify before you again today.

Today I am testifying only in my personal capacity and not on behalf of the Hudson Institute or of the law firm of Wiley Rein, LLP, where I am a partner. I am also not testifying on behalf of any client of Wiley Rein. The thoughts I express today are purely my own.

I have been before this Committee many times of over the years, including when I was a commissioner of the Federal Communications Commission (FCC) from 2006 to 2013. While there, I served both in the majority and minority. We have had many positive and constructive conversations in this room about FCC reform. One of the refreshing aspects of that topic is the tremendous potential it offers for bi-partisan cooperation to find solutions in the spirit of pursuing good government. It can be done because it has been done. For example, former Acting Chairman of the FCC, Mike Copps, and I collaborated on many reform efforts including the modernization of the FCC's ex parte rules and proposed changes to the Sunshine in Government Act.

I note with great enthusiasm that several bills and discussion drafts written on both sides of the aisle are being considered by this Committee. Good ideas abound and I applaud the Members of this Committee for the energy and good faith they are putting behind this effort.

For brevity's sake, I have attached previous testimony of mine and letters I have written over the years regarding FCC reform. I doubt that we will be able to get to all of these topics today, but I include them as food for thought.

The bottom line on reform efforts, however, is that they should be based on the principles of sound due process, transparency, accountability, fairness and efficiency. Here is a summary of some ideas I have proposed over the years which I hope we can discuss today:

- Forbearance authority should apply to all platforms and industries, not just traditional telecom services regulated under Title II;
- The Commission should be required to justify new rules with bona fide cost-benefit market analyses;
- New rules should sunset after a defined period and their renewal should be justified from scratch in new proceedings with public notice and comment;
- Applicants seeking license transfers in the context of mergers should be permitted to waive their right to an evidentiary hearing in order to obtain court review when the Commission intends to deny the transfer or condition its approval on compliance with requirements the applicants wish to reject;
- The Commission should be required to complete merger reviews within a defined period (a true “shot clock”) unless it meets the burden of making an extraordinary showing that more time is needed for the review;
- Congress should consider adopting a statutory requirement that the public interest requires the Commission to justify every transaction approval condition and then tailor any condition narrowly (i.e., the Commission may set a narrowly-tailored condition to cure a harm only after a meaningful economic analysis demonstrates that the merger will cause harm to consumers);
- The Sunshine Act should be modernized so more than two commissioners can meet at a time to discuss substance;
- Various FCC reports should be eliminated and/or consolidated (e.g. the Orbit Act Report, Wireless Competition Report, Video Competition Report, International Broadband Data Report, etc.); and

[The appendices to Mr. McDowell's testimony have been retained in committee files and can be found at: <http://docs.house.gov/meetings/IF/IF16/20150515/103464/HHRG-114-IF16-Wstate-McDowellR-20150515.pdf>.]

Mr. WALDEN. Well, thank you, Mr. McDowell.

We appreciate the testimony of all of our witnesses. We will go into the question phase at this point, knowing we are going to get votes here in a minute. And I actually look at what we are doing here today as kind of phase one of the Comms Act update is Title 1, which is how the FCC itself operates. There are many other issues to come in our efforts, but certainly the operations of the Commission itself need to be reviewed from time to time, that is our responsibility.

I know there has been a lot said about how we are just focused on one Commission, and I think Mr. Benjamin you touched on this, as others have over time, that somehow changing the rules here isn't how we should do this. We should do it across all agencies.

But, Mr. McDowell, isn't it true that the FCC actually doesn't operate fully under the APA today? It has its own—like for example, I pointed out in the last hearing, the IG is appointed by the Chairman and reports to the Chairman. That is not the way it is in other agencies necessarily. It has its own unique carve out, doesn't it?

Mr. McDOWELL. Well, it can, yes, absolutely. And the example you point out is a good example of that, so—

Mr. WALDEN. And your cost-benefit analysis required in other agencies is not here, correct?

Mr. McDOWELL. Correct.

Mr. WALDEN. And do you think that should change?

Mr. McDOWELL. Absolutely. I mean, I have called for that for years when I was a Commissioner. I think it would benefit everybody. What are the costs? There are costs to new rules, and there is sometimes and almost always unintended consequences. Sometimes there are intended consequences. But we should take a look at those in a fully vetted way. And those can actually harm the most entrepreneurs and small businesses.

Mr. WALDEN. And what do you make of Mr. May's suggestion that rules every 2 years should be reconsidered?

Mr. McDOWELL. Randy and I have agreed on a lot of things over the years, and whether two is a magic number or some other period of time, the spirit of that is that they should be renewed and reviewed often, and they should be sunsetted.

Mr. WALDEN. Do you think that would create too much uncertainty in the marketplace if the rules get changed every 2 years or reviewed every 2 years or 3 or 4?

Mr. McDOWELL. Well, however many years it would be, you could make that argument certainly, but a bad rule in place isn't good for the marketplace either.

Mr. WALDEN. Mr. May, do you want to comment further on your suggestion.

Mr. MAY. Thank you, Mr. Chairman.

And, you know, it took me a long time to be old enough not to question a Duke law professor, but now I think I have the years.

On the point you raised about the APA changing that Mr. Benjamin has raised and raised before versus making changes to the Communications Act, I just want to say this because this is an important point that has reoccurred: The APA sets minimum requirements for Federal agencies subject to it, which are most Federal agencies, including the FCC. But, in many agencies, there are different procedural requirements that Congress has adopted. The FTC, EPA, OSHA, they all have different procedural requirements because they do different things, and they have different subjects and issues.

And, in this particular case, aside from the differences in the FCC's jurisdiction, this committee has identified process failures over the last 2 years, 1 to 2 years that, in my view, are pretty substantial, which warrant addressing those.

And then I think the final thing I would say on this point is that I think there is a value sometimes in experimenting with different processes. I don't think all the agencies have to be the same. We may learn some things if these procedures are adopted that would be useful to apply to other agencies, or we may learn that they need to be adjusted, or we may learn possibly that they don't work and Congress is going to be back next year and the year after, and they can be either tweaked or eliminated.

But I don't—the final thing I would say is, I don't think it is a reason not to make changes because there may possibly be litigation about some of the terms in the laws. I mean, if you take that view, then you guys wouldn't do anything up here if you are concerned that the law you adopted—

Ms. ESHOO. And gals.

Mr. MAY. And gals, yes. I meant that generically, Ms. Eshoo.

Mr. WALDEN. Let me go to this point, and that is, Mr. May, you referred to the FCC's practice of granting the staff editorial privileges in your prepared testimony. How does that longstanding practice affect Commission transparency and decisionmaking?

Mr. MAY. Well, to me, this is a pretty fundamental point. I have watched the grant of editorial privileges for basically three decades. My perception is it is difficult to prove empirically, but I think over time, it is more often than not—not more often than not, but it is more common now that these editorial privileges may involve things we would consider substantive.

But the basic problem is—

Mr. WALDEN. Yes. I have got 18 seconds left. Mr. McDowell, from your experience there, talk just quickly, editorial privilege. What does that really mean in reality?

Mr. McDOWELL. Well, in the ideal, it means typos and cosmetic, not substantive changes, not like throwing in the word "not."

Mr. WALDEN. Or "shall."

Mr. McDOWELL. Or "shall," yes, exactly.

Mr. WALDEN. And that does happen?

Mr. McDOWELL. Yes, it has. Yes, absolutely, it has.

Mr. WALDEN. All right. My time is expired.

Turn to the gentlelady from California, Ms. Eshoo, for 5 minutes.

Ms. ESHOO. Thank you, again, to the witnesses.

The current FCC process reform bill language provides for a delay—and I mentioned that in my opening statement in—the im-

plementation of the FCC Collaboration Act. Now, given the widespread support, and it has been already touched on in your testimony, the support for the reform, do you think that such a delay is necessary? We say it is great. It is important. We should move ahead with it. We embrace it. We support it. We endorse it, but we are going to delay it. So tell me what you think.

Mr. MAY. Thank you, Ms. Eshoo. And I apologize for the reference to “guys.”

Ms. ESHOO. That is all right.

Mr. MAY. I meant it generically. But, look, I would say this, I am a long-time supporter of the Sunshine Act exchange.

Ms. ESHOO. I know you are.

Mr. MAY. I support these changes. I, myself, might go further.

Ms. ESHOO. But do you think it should be delayed?

Mr. MAY. I think this should be done together for this simple reason, that when you look at all these changes, they all relate to how the Sunshine Act works in terms of advance publication of notices, what you do afterwards. So I would do them all together. That would be my preference.

Ms. ESHOO. Thank you.

Mr. BENJAMIN. I personally don't see any reason for delay only because this is the only issue on which I believe every single administrative lawyer in the country—well, 99.8 percent would agree.

Ms. ESHOO. That is pretty good, yes.

Mr. BENJAMIN. It is hard to think of anything that has more unanimity than that. The Government Sunshine Act has had unintended consequences, producing, as far as I can tell, the only benefit of which is more discussions of the Nationals.

Ms. ESHOO. Exactly.

Commissioner McDowell.

Mr. MCDOWELL. That can be a good thing. They were the best team in the National League last year.

Mr. BENJAMIN. But they didn't go anywhere.

Mr. MCDOWELL. Playoffs will fix that.

So, in an ideal world, we would want these things to be done as quickly as possible. Obviously, there are other circumstances in reality that prevent that sometimes.

Ms. ESHOO. But do you think it shouldn't be delayed?

Mr. MCDOWELL. In the ideal, no.

Ms. ESHOO. Exactly, yes.

Mr. Benjamin, are there any statutory changes that you think are necessary to improve efficiency at the Commission?

Mr. BENJAMIN. “Necessary” is a tough word. I don't think much is necessary, so, as a high enough hurdle, that nothing jumps out at me that I would think, boy, you absolutely have to do this.

Ms. ESHOO. Yes. Under Representative Latta's bill, it is my understanding that a list of all the delegated items, including routine application, processing, noncontroversial public notices, would have to be publicly produced 48 hours before the bureau is allowed to act.

Now, we heard 2 weeks ago that the Commission literally makes hundreds of thousands of delegated authority decisions on a yearly basis. We had a lot of conversation about this at the last hearing.

How do you think this new requirement would impact the Commission's work?

And I think, Commissioner McDowell, you probably want to lean in on this. And what do you think the cost impacts would be?

Mr. MCDOWELL. Actually, I think the cost impacts, to start with that, would be minimal. The staff is already working on those matters, right, so by merely kind of listing them on the Web site. As the FCC's IT system improves hopefully, it should be an incremental cost, if any additional cost. And, actually, it improves transparency. I don't think it would be a burden on the staff at all. They are already working on it.

Ms. ESHOO. Thank you very much.

In the interest of time, Mr. Chairman, I am going to yield back, but just one comment. I think given what our three witnesses, how they responded to my question about the Collaboration Act and delay, that we shouldn't delay.

So I yield back. Thank you.

Mr. WALDEN. Appreciate that.

And I think the FCC already produces its Daily Digest of all those, doesn't it?

Mr. MCDOWELL. The Daily Digest is about actions that have happened, and it is not about everything that goes on at the Commission necessarily.

Mr. WALDEN. All right. Mr. Latta, we will turn to you for 5 minutes.

Mr. LATTA. Well, thank you, Mr. Chairman.

And again, to our witnesses, thanks very much for appearing today.

Mr. McDowell, if I may, over the past several Congresses, I have introduced legislation that would require the FCC to conduct cost-benefit analysis at the time of a notice for proposed rulemaking and again at the time the final rule is issued. I believe that a cost-benefit analysis will provide the public with a transparent monetary impact of the FCC rules. Additionally, under the APA, other agencies already determine a cost-benefit analysis of rules.

Do you think that the FCC should be held to the same standard? And do you also believe it would be an advantage for the Commissioners to have a better understanding of what cost and benefits are of an action before they vote?

Mr. MCDOWELL. Absolutely. And something I called for for years as a Commissioner as well. I think it is just a matter of good government to know what are the costs of the proposed rules. There are similar statutes already in place, Paperwork Reduction Act, the Regulatory Flexibility Act, but they are not quite the same as what you are proposing. And I think what you are proposing actually makes it clearer and would make the agency more accountable for its actions if it knows that the rules it is about to impose or going to impose cost.

So I think that could only be a benefit. Sometimes rules need to be put in place, but let's understand exactly what the effects and the side effects might be.

Mr. BENJAMIN. Can I jump in on that?

Mr. LATTA. Mr. Benjamin, go right ahead.

Mr. BENJAMIN. So there is a bill that Senator Portman introduced in the previous Congress, the Independent Agency Regulatory Analysis Act, that would have all independent agencies' regulations be run through OIRA or just like executive agencies. So it would be the same process. For what it is worth, I will just say, strikes me as a great idea to have everything subject to cost-benefit analysis.

Mr. LATTA. Well, thank you very much.

Mr. Chairman, in the interest of time, since I think we are voting, I will yield back.

Mr. WALDEN. Gentleman yields back.

Recognize gentleman from Vermont.

Mr. WELCH. Well, we have votes, but two things: One, I want to thank the chair and the ranking member for having this hearing. Number two, I really think this is an area where we should try to make what changes will help the organization function better. And we have got tremendous witnesses here who have given us some concrete suggestions. And I am all in on trying to implement some of these changes to make it work better.

We should be spending our times having the debate about policy and being, in my view, as accommodating to folks who have responsibility to run these institutions so that they have the equipment they need, they have procedures in place, and that they can do the tough job we give them as efficiently as possible.

So thanks for you and Ms. Eshoo for having this hearing.

And thank you for the witnesses coming here and really appreciate the benefit of your experience and advice.

Mr. WALDEN. I think that we are in the middle of votes, and we are going to be probably an hour plus. So I think we probably move to adjourn. I don't know if any members—this is the last votes of the day, so I would be surprised if we had too many come back.

I think that is what we will do is that, rather than hold you all here with the hopes someone comes back on a go-away day and the last votes, I think what we will do is ask you to respond to written questions as submitted by our colleagues and ourselves.

We very much value your testimony, your counsel. You bring years of really important experience to the table. We have listened to your past suggestions and tried to incorporate those, and we will listen to these as well and plan to move forward.

So thank you very much.

And, with that, the subcommittee stands adjourned.

[Whereupon, at 10:06 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. FRED UPTON

The quality of our rules and laws are judged as much by the process under which they are produced as by the substance of their words. Our best work comes through an open, transparent, and accessible process—whether in the halls of Congress or the caverns of the federal bureaucracy. Too often of late, however, the work of the FCC has been marred by opacity and gamesmanship. Information on the commission's process has been relegated to after-the-fact press statements—leaving us all guessing how the FCC makes decisions. As a result, trust in those decisions has suffered.

Oversight of the commission and dedication to ensuring the highest standards of conduct from commissioners has long been a hallmark of the Energy and Commerce Committee. That work continues with a bill to reform FCC processes generally,

sponsored by Subcommittee Chairman Greg Walden and Ranking Member Anna Eshoo, as well as three draft bills offered by Democratic members of this subcommittee. This subcommittee has always fostered bipartisanship, and it is extremely encouraging that we are able to strengthen this tradition today.

I applaud my Democratic colleagues for joining us in calling for improved transparency and better process at the FCC. I firmly believe that we can and will make the commission a more efficient and accountable agency.



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

May 14, 2015

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Anna G. Eshoo
Ranking Member
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives
2328-B Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Walden and Ranking Member Eshoo:

Thank you for the opportunity to testify in front of your Subcommittee on April 30th at the hearing entitled "FCC Reauthorization: Improving Commission Transparency." It was a robust dialogue, and I appreciate hearing directly your Subcommittee members' questions, concerns, and goals. During the hearing, we touched on a wide variety of process reform issues, including changes made at the Commission since I began my chairmanship and future work to be done on our internal process reforms. To that end, I would like to provide important details and commitments on our future internal process reform plans.

As I mentioned at the recent hearings, a key part of this initiative is a new task force that I convened in response to the concerns expressed by Commissioner O'Rielly in his blogs and other statements regarding long-standing internal procedures at the Commission. Our internal processes and protocols must work for every member of the Commission, and so I asked my fellow Commissioners to nominate a representative from each of their offices to participate in the task force. We need everyone at the table.

As we discussed at the hearing, the task force will have a multi-faceted agenda. It will start by reviewing the practices of other similar agencies in the areas of transparency, rulemaking, and delegated authority. The task force will use the data from other agencies' practices to inform its work in developing recommendations for proposed changes in processes relating to these areas here at the FCC. Topics that will be reviewed and considered will include, but are not limited to: (a) the use of delegated authority, and practices for providing notice of matters being handled on delegated authority; (b) procedures for pre-vote circulation of Commission-level matters; (c) procedures associated with editorial privileges after adoption of an item; (d) practices to encourage efficient Commission decision-making, such as the Consent Agenda; (e) approaches for providing increased transparency of FCC procedures and protocols;

Page 2—The Honorable Greg Walden
The Honorable Anna G. Eshoo

and (f) practices to track, disclose and encourage prompt Commissioner votes on items on circulation.

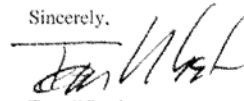
While the task force will be led by senior staff at the Commission, its inquiry and research will solicit input from both internal and external stakeholders. For instance, I expect it will set up a comment mechanism to solicit input from those who do business regularly at the FCC, including consumers, licensees, and practitioners. It may make use of roundtables or focus groups of internal and external stakeholders, as well as hold Congressional staff briefings. It also may propose trials or pilot programs to see how a particular new process proposal would actually work in practice.

The task force has already discussed a path forward, including which agencies to review and what topics to cover in that outreach, and indeed that agency outreach is already underway. I expect the task force will meet regularly over the next few months, and will welcome creative ideas, regardless of whether they have been tried by other agencies. The goal is for the task force to propose a package of reforms for the Commissioners to review in September. As I committed to you during your hearing, I will update you and your colleagues on the recommendations of the task force this fall for review and dialogue.

I want to emphasize that the broader work on implementing the recommendations of the February 2014 Process Reform report will continue in parallel to the work of this new task force. There is much yet to be done in that context, and staff throughout the agency will continue to make progress on that initiative.

Working with my fellow Commissioners, I hope and expect that we can make substantial steps toward improving the FCC so that we better serve American consumers and businesses. I am committed to a task force that is focused on results – through recommendations and action items – rather than one that gets bogged down in endless reports. I believe Congress and the public deserve nothing less. I look forward to sharing with you and your Congressional colleagues the outcome of this process in the early fall, as well as keeping you informed as the work progresses.

Sincerely,



Tom Wheeler

cc: The Honorable Fred Upton
Chairman, Committee on Energy and Commerce

The Honorable Frank Pallone
Ranking Member, Committee on Energy and Commerce



May 15, 2015

The Honorable Doris Matsui
U.S. House of Representatives
2311 Rayburn House Office Building
Washington, DC 20515

Dear Congresswoman Matsui:

I write to you on behalf of the Small Company Coalition (SCC) in support of your proposed legislation regarding consultation between the Federal Communications Commission (FCC) and the Small Business Administration (SBA).

The SCC membership consists of a number of small rural and tribal communications carriers from across the country along with vendors that provide services and goods for their operational needs. The SCC's communications carriers are small businesses that provide telecommunications and broadband service to rural households, farms, and small businesses.

The SCC is concerned about the growing regulatory requirements that burden small rural and tribal communications companies. These requirements are costly, time consuming, and often have a negative impact on the deployment and operation of the ever-evolving rural communications network.

While the SCC understands the need for transparency and accountability, the current regulatory environment needs to be examined. SBA consultation on the impact of FCC requirements is a welcome positive step.

We thank you for your interest and leadership on this issue. Please let us know how we can assist this effort in the future.

Sincerely,

James J. Kail
Executive Committee Member

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-2927
Minority (202) 225-3641

June 10, 2015

Mr. Randolph May
President
The Free State Foundation
P.O. Box 60680
Potomac, MD 20859

Dear Mr. May:

Thank you for appearing before the Subcommittee on Communications and Technology on May 15, 2015, to testify at the hearing entitled "FCC Reauthorization: Improving Commission Transparency Part II."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on June 24, 2015. Your responses should be mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515 and e-mailed in Word format to Charlotte.Savercool@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

The Free State Foundation



June 12, 2015

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
2125 Rayburn House Office Building
Washington, DC 20515-6115

Dear Chairman Walden:

Enclosed please find my Responses to the Questions for the Record in connection with the hearing on May 15, 2015, entitled, "FCC Authorization: Improving Commission Transparency Part II."

Thanks again for inviting me to testify at this important hearing. Of course, if you or other Members should have any other questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Randolph J. May".

Randolph J. May
President
The Free State Foundation

cc: The Honorable Anna Eshoo
Charlotte Savercool

RESPONSES OF RANDOLPH MAY TO QUESTIONS FOR THE RECORD

Hearing on “FCC AUTHORIZATION: IMPROVING COMMISSION TRANSPARENCY PART II” – May 15, 2015

The Honorable Greg Walden

1. My May, you mention in your written testimony Recommendations of the Administrative Conference of the U.S. that you suggest are relevant. Would you please elaborate on the Recommendation?

Response: At the top of the home page of the ACUS website is a quote from President Barack Obama: “ACUS is a public-private partnership designed to make government work better.” As a Public Member of the Administrative Conference of the United States, I can say that this is an accurate statement of ACUS’s mission.

ACUS Recommendation 2014-2, entitled “Government in the Sunshine Act,” was adopted June 5, 2014, by the full Assembly of the Administrative Conference of the U.S.¹ The Recommendation is intended to highlight a number of “best practices” undertaken by agencies, like the Federal Communications Commission, that are subject to the Sunshine Act and to encourage others to consider and implement these best practices as appropriate. Recommendation 2014-2 is especially relevant to the Subcommittee’s transparency reform efforts:

For open meetings, covered agencies should post a meeting agenda on their websites as far in advance of the meeting as possible. **Except for documents that may be exempt from disclosure under the Freedom of Information Act, agencies should also post in advance all documents to be considered during the meeting.** When an agency cannot post non-exempt meeting documents in advance, it should do so not later than the start of the meeting or in a timely manner after the meeting has occurred. (Emphasis added.)

While the Recommendation does not suggest how far in advance the documents to be considered at the meeting should be publicly posted, it does indicate, as a best practice, that they should be posted in advance.

The Research Report accompanying the Recommendation found, upon the basis of a survey of the ACUS-coordinated Council of Independent Regulatory Agencies (CIRA), that many independent agency officials pointed to the electronic posting of agency documents relevant to open meetings as worthwhile, in the same way that all documents, including drafts, working papers, and agenda items, which are prepared for consideration by Federal Advisory Committees, must be made available for public inspection. With respect to matters to be considered at a Sunshine meeting, the Research Report states:

¹ ACUS Recommendation 2014-2 may be accessed at:
<https://www.acus.gov/recommendation/government-sunshine-act>

Responses of Randolph May to Questions for the Record
Hearing on “FCC Reauthorization: Improving Commission Transparency Part II”

Documents that agencies post in connection with open meetings include the following: meeting notices (including Federal Register notices announcing upcoming meetings), press releases, meeting agendas, **staff memoranda to be considered at meetings**, meeting transcripts and/or minutes, public comments received by the agency, and background documents needed to comprehend the meeting discussions (e.g., briefs and copies of relevant past decisions for an adjudication undertaken by a multi-member agency).

Thus, consistent with the ACUS Recommendation 2014-2, staff memoranda, public comments, and other background documents to be addressed at the meeting, including the draft agenda item to be considered by the Commissioners at FCC Sunshine meetings, should be released in advance of the meeting, preferably providing interested parties sufficient time to review the materials and analyze the issues to be addressed at the meeting.²

The Honorable Brett Guthrie

1. You referred to the FCC’s practice of granting the staff “editorial privileges” in your prepared testimony. How does that longstanding practice affect transparency and decision-making?

Response: To the extent that the granting of “editorial privileges” to the staff results only in what generally would be understood to be correcting typos, syntax or other grammatical errors, and the like, the practice would not raise questions implicating transparency and decision-making. But to the extent the grant of editorial privileges actually results in what generally would be understood to be substantive changes (i.e., changes that possibly could be construed in one way or the other to impact legal rights and obligations of parties affected by the Commission’s decision), then questions concerning transparency and decision-making are implicated.

First, if the exercise of editorial privileges results in substantive changes that could be construed in a way that might affect legal rights and obligations of persons impacted by the Commission’s decision, then the agency’s decision was not actually determined at the Sunshine Act meeting as required by the Act. Rather, in fact, the determination was reached outside of the confines of a Sunshine meeting. Indeed, if the Commission’s staff actually makes substantive changes, then the decision ultimately released to the public is not necessarily the decision of the Commissioners that are empowered to vote on agency matters.

Second, under these circumstances, with the staff making changes to a decision supposedly adopted at a Sunshine meeting, the Commission’s decision-making process suffers from a lack of transparency.

² The Research Report may be accessed at:
<https://www.acus.gov/sites/default/files/documents/Government%20in%20the%20Sunshine%20Act%20Draft%20Report%20REVISED%205-7-14.pdf>.

Responses of Randolph May to Questions for the Record
Hearing on "FCC Reauthorization: Improving Commission Transparency Part II"

Again, the use of "editorial privileges" to make changes that generally would be understood to be non-substantive is not especially problematical. But in light of legitimate concerns regarding the occasional abuse of the FCC's ubiquitous grant of "editorial privileges" to the staff at the time of adoption of every agenda item, there should be some action-forcing publication requirement to help ensure that the item before the Commission at the time of a vote, in all material substantive respects, is the order or rule that, per the vote, will become the official final agency action. If this is not the case, then the very purpose of the Sunshine Act is vitiated – if not violated – for the public is not actually witnessing a vote on the actual agency item. Requiring that all items voted on by the Commission be released to the public promptly, say, within two days, would diminish (but not necessarily eliminate) the likelihood that editorial privileges were used to alter the substantive meaning of an item.³

³ I have been a long-standing proponent of revising the Sunshine Act to allow some form of collaborative discussions among agency decision-makers outside of the context of a formal Sunshine meeting, and I chaired a Special Committee of the Administrative Conference of the U.S. that made such a recommendation in 1995. See Randolph J. May, *Reforming the Sunshine Act*, Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act, 49 ADMIN. L. REV. 415 (1997). Nothing in my support for revising the Sunshine Act to allow pre-Sunshine meeting collaborative discussions among agency Commissioners is inconsistent with the transparency reforms discussed herein. Indeed, implementation of transparency requirements associated with the actual conduct of the Sunshine meeting, such as advance disclosure of the draft item to be considered and a prompt publication requirement for the item adopted, are likely to broaden support for allowing pre-meeting collaborative discussions along the lines proposed in the House Commerce Committee's "FCC Process Reform Act."

RESPONSES OF RANDOLPH MAY TO QUESTIONS FOR THE RECORD

Hearing on “FCC AUTHORIZATION: IMPROVING COMMISSION TRANSPARENCY PART II” – May 15, 2015

The Honorable Greg Walden

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Responses of Randolph May to Questions for the Record
Hearing on “FCC Reauthorization: Improving Commission Transparency Part II”

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Responses of Randolph May to Questions for the Record
Hearing on “FCC Reauthorization: Improving Commission Transparency Part II”

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FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-2997
Minority (202) 225-3641

June 10, 2015

The Honorable Robert M. McDowell
Partner
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

Dear Commissioner McDowell:

Thank you for appearing before the Subcommittee on Communications and Technology on May 15, 2015, to testify at the hearing entitled "FCC Reauthorization: Improving Commission Transparency Part II."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on June 24, 2015. Your responses should be mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515 and e-mailed in Word format to Charlotte.Savercool@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,


Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

THE HON. ROBERT M. MCDOWELL

Questions for the Record from the May 15, 2015 House Committee on Energy and Commerce Hearing:

"FCC Reauthorization: Improving Commission Transparency Part II"

—The views expressed here are my own and do not necessarily represent the views of Wiley Rein or any of its clients—

MEMBER REQUESTS FOR THE RECORD**The Honorable Brett Guthrie**

1. The FCC seems to have many, varying definitions of "small business." Would small businesses benefit from the clarity of a more uniform definition? Would requiring the use of the definition of "small business concern" in the Small Business Act make more sense than the Commission's ad hoc approach?

Thank you, Congressman, for the opportunity to offer my views on this important topic. As an FCC Commissioner from 2006 to 2013, I consistently called for greater awareness of the unique economic realities that face small and disadvantaged businesses in the communications industry. Navigating the ever expanding regulatory environment facing businesses today is a challenging task, even for the largest, most well-established companies. As a result, it is vital for regulators—and lawmakers—to recognize the particular needs of small businesses when crafting new, or revising old, laws and regulations. This includes taking every opportunity to simplify necessary regulations, when possible, while eliminating regulations that have proven to be outdated or ineffective.

Unnecessarily complicated regulations often disproportionately harm small businesses that lack the resources and experience required to ensure compliance and defend against government inquiries, justified or not. As a result, the Commission should consider the particular effect new regulations are likely to have on small businesses and focus on adopting simple rules that are straightforward and are applied in a consistent fashion. Adopting a universal definition of "small business" would undoubtedly simplify the Commission's rules by providing clarity to entities that currently straddle the various definitional lines applicable to small to medium size, and disadvantaged businesses.

On the other hand, the clarity resulting from adopting a universal definition must be weighed against the costs associated with reducing the Commission's ability to be flexible enough to tailor its rules for various unique situations. For example, there are compelling reasons to define a small or disadvantaged business differently when determining which entities qualify for competitive bidding credits, as opposed to crafting a definition in the context of exempting small businesses from various regulatory requirements. These types of entities have been in the news quite a bit recently. The need for flexibility to regulate in a manner that fits a particular issue or problem makes it challenging to craft a one-size-fits-all definition.

If the Commission were to adopt a universal definition, however, the term "small business concern" as defined in the Small Business Act could offer a useful starting point for discussions. The SBA's focus on market power, as opposed to revenue, could provide the Commission with needed flexibility, while simplifying its regulations by replacing numerous "small business" classifications with a relatively straightforward and uniform definition.

THE HON. ROBERT M. MCDOWELL

Questions for the Record from the May 15, 2015 House Committee on Energy and Commerce Hearing:

"FCC Reauthorization: Improving Commission Transparency Part II"

—The views expressed here are my own and do not necessarily represent the views of Wiley Rein or any of its clients—

At the end of the day, different definitions can be useful given different contexts (e.g., media ownership, spectrum auctions, Universal Service subsidies, etc.). Nonetheless, relying on an ad hoc approach too much can produce inconsistent or arbitrary results. You are perceptive to identify this issue and consider different options. I would be delighted to work with you further on this matter.